

2
No. 91-914

RECEIVED
FILED
FEB 14 1992

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

LIH Y. YOUNG, PETITIONER

v.

LOUIS W. SULLIVAN,
SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

MARLEIGH D. DOVER

FRED P. PHILLIPS IV

Attorneys

*Department of Justice
Washington, D.C. 20530
(202) 514-2217*

QUESTIONS PRESENTED

1. Whether the U.S. Department of Health and Human Services properly processed petitioner's complaint charging the Department with employment discrimination.

2. Whether Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, creates a private cause of action for the improper processing of employment discrimination complaints.

TABLE OF CONTENTS

| | Page |
|----------------------|------|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statement | 2 |
| Argument | 5 |
| Conclusion | 9 |

TABLE OF AUTHORITIES

Cases:

| | |
|--|---|
| <i>Francis-Sobel v. University of Maine</i> , 597 F.2d 15 (1st Cir.), cert. denied, 444 U.S. 949 (1979) | 8 |
| <i>Georator Corp. v. EEOC</i> , 592 F.2d 765 (4th Cir. 1979) | 8 |
| <i>Gibson v. Missouri Pac. R.R.</i> , 579 F.2d 890 (5th Cir. 1978), cert. denied, 440 U.S. 921 (1979) | 8 |
| <i>Hall v. EEOC</i> , 456 F. Supp. 695 (N.D. Cal. 1978) .. | 7 |
| <i>Mackey v. Sullivan</i> , 55 Fair Empl. Prac. Cas. (BNA) 1134 (D.D.C. 1991) | 7 |
| <i>McCottrell v. EEOC</i> , 726 F.2d 350 (7th Cir. 1984) .. | 8 |
| <i>Ward v. EEOC</i> , 719 F.2d 311 (9th Cir. 1983), cert. denied, 466 U.S. 953 (1984) | 8 |

Statute and regulations:

| | |
|---|------------|
| Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e <i>et seq.</i> | 4, 5, 7, 8 |
| 29 C.F.R.: | |
| § 1613.212 (a) | 2-3, 4 |
| § 1613.212 (a) (1) | 3 |
| § 1613.215 | 3 |
| § 1613.215 (a) (3) | 3 |

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-914

LIH Y. YOUNG, PETITIONER

v.

LOUIS W. SULLIVAN,
SECRETARY OF HEALTH AND HUMAN SERVICES

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. A5-A7) is unreported, but the decision is noted at 946 F.2d 1568 (Table). The amended order of the district court dismissing the complaint in part (Pet. App. A13-A17) is reported at 733 F. Supp. 131. The subsequent order of the district court dismissing the action (Pet. App. A8-A12) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1991. A petition for rehearing was denied on September 19, 1991. Pet. App. A1-A2. The petition for a writ of certiorari was filed on Decem-

ber 12, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a female of Chinese national origin, worked in various capacities for the United States Department of Health and Human Services (HHS) from 1978 to 1986. In 1984, she filed the first of at least eight administrative complaints alleging employment discrimination based on race and national origin. Pet. App. A65.

The administrative complaint that gave rise to the present action was filed with HHS in November 1988 and was assigned case number OSH-82-89. Pet. App. A38. In that complaint, petitioner made 18 allegations; they were reviewed by an Equal Employment Opportunity counselor and numbered sequentially. *Id.* at A52-A59. Allegations 1 through 8 charged that from "1978-Present" HHS discriminated against "minorities" in promotions, discharges, job assignments, training, and discipline. *Id.* at A54-A56. Allegations 9 through 18 alleged that from "1984-Present" HHS and the Equal Employment Opportunity Commission (EEOC) improperly processed discrimination complaints. *Id.* at A56-A58. In particular, petitioner alleged that HHS had failed to provide her with information bearing on her discrimination charges and had placed falsified records in her investigative file. *Id.* at A56. More generally, she alleged that discrimination complaints against HHS were subject to undue delays in processing, inadequate investigation, and unjust disposition. *Id.* at A56-A58.

2. HHS rejected petitioner's complaint. Pet. App. A38-A51. It determined that allegations 1 through 8 failed to state a claim of discrimination under 29

C.F.R. 1613.212(a). HHS observed that Section 1613.212(a) provides for the "acceptance of a complaint from any aggrieved *employee* * * * who believes that . . . [s]he has been discriminated against." Pet. App. A43 (quoting, with emphasis, 29 C.F.R. 1613.312(a)). HHS found that petitioner failed to establish in allegations 1 through 8 that she had been aggrieved by the discriminatory conduct that she alleged:

We have carefully reviewed your formal complaint and its attachments. Even though these documents reflect your broad concerns about the operations of [the Office of the Secretary of HHS] and the alleged discriminatory treatment of other employees and minorities, we are unable to identify any specific employment matter or personnel action in Issues/Allegations Numbers 1 through 8 which concerns you personally.

Pet. App. A43. Based on that finding, HHS concluded that rejection of petitioner's complaint as to allegations 1 through 8 was required under 29 C.F.R. 1613.212(a)(1).¹ HHS further concluded that petitioner's remaining allegations were also subject to rejection under 29 C.F.R. 1613.312(a)(1) because they were "'spin-offs' of those complaints previously

¹ 29 C.F.R. 1613.215 provides in relevant part:

(a) The agency head or designee shall reject or cancel a complaint:

(1) That fails to state a claim under § 1613.212 or that states the same claim that is pending before or has been decided previously by the agency.

See also 29 U.S.C. 1613.215(a)(3) (requiring rejection of any complaint "[t]hat is the basis of a pending civil action in a United States District Court in which the complainant is a party").

filed by [petitioner] and which [petitioner] ha[d] included in [her] civil action in a U.S. District Court." Pet. App. A46.

3. On appeal, the EEOC affirmed, concluding that "[HHS's] decision to reject [petitioner's] complaint was proper." Pet. App. A32. The EEOC determined that none of petitioner's allegations stated a claim of discrimination under 29 C.F.R. 1613.212(a) :

[Petitioner] alleges discrimination against 'minorities' in general and has not indicated how [s]he, personally, is aggrieved. Section 1613.212(a) provides only for the acceptance of complaints from persons who are themselves aggrieved by the conduct of which they complain.

Pet. App. A31. In connection with this determination, the EEOC noted that HHS had "requested more specific information from [petitioner] on several occasions so as to better define [her] allegations [but] [petitioner had] failed to provide the specific information." *Id.* at A30.

4. Petitioner then commenced the present action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, in the United States District Court for the District of Columbia. She charged HHS with employment discrimination based on race and national origin, and she claimed that she had been retaliated against for filing discrimination complaints. In addition, she alleged that HHS and the EEOC had improperly processed and investigated her administrative complaints. In orders dated March 19, 1990, and June 6, 1990, the district court dismissed petitioner's complaint in its entirety.

In the first order, the court dismissed all of petitioner's claims against the Chairman of the EEOC, and it also dismissed the claims against HHS that

alleged improper processing. Pet. App. A13-A22. The court held that "Title VII creates only a cause of action for discrimination. It does not create an independent cause of action for the mishandling of an employee's discrimination complaints." *Id.* at A16.

In its subsequent order, the court dismissed petitioner's remaining claims against HHS on the ground that they were barred by *res judicata*. Pet. App. A8-A12. The court determined that, in the present case, petitioner "assert[ed] the same causes of action and ma[d]e the same factual allegations" as she had advanced in a prior action against HHS, *Young v. Secretary of Department of Health & Human Services*, No. 88-0004 (D.D.C.). Pet. App. A11. That action, the court noted, ended in a judgment against petitioner following a two-day trial. *Ibid.* Because petitioner had "ma[d]e no attempt [in this case] to *articulate* the facts or legal theories which [petitioner] vaguely assert[ed] [were] 'distinct' from those in the 1988 action," the court concluded that "*res judicata* bars the instant lawsuit." *Id.* at A12.

5. The court of appeals summarily affirmed in an unpublished order. Pet. App. A5-A7.

ARGUMENT

Petitioner does not challenge the determination by both courts below that her claims of employment discrimination by HHS are barred by *res judicata*. Instead, petitioner renews her contention (Pet. 15-27) that HHS and the EEOC improperly processed her discrimination complaints. She also contends (Pet. 27-39) that the courts below erred in holding that Title VII does not create a private cause of action for improper processing. These contentions do not warrant further review.

1. Petitioner's improper-processing claims were correctly rejected. Those claims consisted almost entirely of vague, conclusory allegations of unjust treatment. Petitioner repeatedly failed to identify specific instances of improper treatment, despite opportunities to do so. See Pet. App. A30, A52-A53. The district court correctly concluded that petitioner did not "articulate [any] facts or legal theories" to distinguish petitioner's "vague[]" allegations in the present case from the allegations that she has made on previous occasions. *Id.* at A12 (emphasis omitted).²

The only specific instance of allegedly improper processing that petitioner cites in this Court lacks merit. Petitioner contends that HHS erred when, for purposes of its decision, it consolidated under one heading several allegations that were listed separately in her administrative complaint. Pet. 18-20.

² Indeed, it appears that most, if not all, of petitioner's improper-processing claims are barred by *res judicata*. The district court in the present case found that in *Young v. Secretary of Department of Health & Human Services*, No. 88-0004 (D.D.C.), petitioner asserted "[improper] processing of her administrative complaint during the 1978-1986 time period." Pet. App. A11. The court determined that these and the other allegations in petitioner's previous action against HHS were the same as the allegations in the present case. *Ibid.* Petitioner's submission to this Court confirms the district court's determination. Petitioner states that "the immediate basis" for the complaint in the present case "was [HHS's] improper consolidation and rejection of certain issues in [administrative] complaints SSA-102-86 and SSA-366-86." Pet. 30. Petitioner then states that her prior action, *Young v. Secretary of Department of Health & Human Services*, No. 88-0004 (D.D.C.), was likewise "brought to appeal [HHS's] improper consolidation and rejection of certain issues in these two complaints [*i.e.*, administrative complaints SSA-102-86 and SSA-366-86]." Pet. 30 n.10.

Petitioner does not, however, cite any regulation (and we are aware of none) that required HHS to quote petitioner's allegations *verbatim*. HHS fairly summarized the substance of all of petitioner's allegations in its opinion. Compare Pet. App. A45 ("Issue/Allegation No. 11") with *id.* at A56-A58. HHS also clearly explained why it rejected those allegations. See *id.* at A38-A47.

2. Petitioner contends that instances of improper processing should be treated as separate acts of discriminatory treatment under Title VII. Pet. 27-39. The district court, however, correctly concluded that "Title VII creates only a cause of action for discrimination. It does not create an independent cause of action for the mishandling of an employee's discrimination complaints." Pet. App. A16. As the court recognized, while improper processing of an employee's complaint may in some cases furnish evidence of an employing agency's discriminatory motive, it cannot provide the basis for an independent claim against the employing agency. *Id.* at A16 n.2. That is because "[t]he only right [Title VII] establishes is the right to be free of discrimination. This interest is wholly preserved, even if the [agency] errs in its processing of the charge, by the right to a trial *de novo*." *Id.* at A16-A17 (quoting *Hall v. EEOC*, 456 F. Supp. 695, 700 (N.D. Cal. 1978)). Accord *Mackey v. Sullivan*, 55 Fair Empl. Prac. Cas. (BNA) 1134, 1135 (D.D.C. 1991).

For similar reasons, the district court correctly held that Title VII did not provide petitioner with a cause of action against the EEOC for its allegedly improper processing of her discrimination charges.³

When a Title VII plaintiff believes that the EEOC has failed to vindicate her right to be free of employment discrimination, the remedy is to bring a civil action directly against the employer. "Implying a cause of action against the EEOC [would contradict] this policy of individual enforcement * * * and could dissipate the limited resources of the Commission in fruitless litigation with charging parties." *Ward v. EEOC*, 719 F.2d 311, 313 (9th Cir. 1983), cert. denied, 466 U.S. 953 (1984). For that reason, "[i]t is settled law * * * that Title VII does not provide either an express or implied cause of action against the EEOC to challenge its investigation and processing of a charge." *McCottrell v. EEOC*, 726 F.2d 350, 351 (7th Cir. 1984). Accord, e.g., *Francis-Sobel v. University of Maine*, 597 F.2d 15, 18 (1st Cir.), cert. denied, 444 U.S. 949 (1979); *Georator Corp. v. EEOC*, 592 F.2d 765, 768 (4th Cir. 1979); *Gibson v. Missouri Pac. R.R.*, 579 F.2d 890, 891 (5th Cir. 1978) (per curiam), cert. denied, 440 U.S. 921 (1979).

³ Petitioner has not named the EEOC or its Chairman in her petition. The Chairman was, however, a party in the courts below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

MARLEIGH D. DOVER
FRED P. PHILLIPS IV
Attorneys

FEBRUARY 1992